SC92326

IN THE SUPREME COURT OF MISSOURI

STAN MCCLATCHEY, et al.,

Appellants,

vs.

ROBIN CARNAHAN, et al.

Respondents.

On Appeal from the Circuit Court of Cole County
Honorable Daniel R. Green, Circuit Judge

BRIEF OF INTERVENOR-RESPONDENTS

February 13, 2012

Respectfully Submitted by:

Todd P. Graves (MO Bar No. 41319)
Edward D. Greim (MO Bar No. 54034)
Clayton J. Callen (MO Bar No. 59885)
Graves Bartle Marcus & Garrett, LLC
1100 Main Street, Suite 2700
Kansas City, MO 64105
Telephone: (816) 256-4144
Facsimile: (816) 817-0863
E-mail: edgreim@gbmglaw.com

Attorneys for Intervenor-Respondents

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PRELIMINARY STATEMENT

The circuit court correctly found as a matter of fact that H.B. 193, the General Assembly's congressional redistricting legislation (the "Grand Compromise"), is as compact as may be. Appellants did not carry their burden of proving clearly and undoubtedly that the Grand Compromise fails this standard.

Just as significantly, the circuit court found as a matter of fact that, even after controlling for other constitutional mandates, it is not possible in theory or in practice to find the "most compact" districting plan or the plan that is "as compact as possible." What is susceptible to proof and judicial determination is the factual question of whether a districting plan is clearly closer to the pole of perfect compactness than the pole of non-compactness, and the factual question of whether a plan satisfies the three "fundamental ideas" this Court previously instructed were embodied in the "as may be" language. The circuit court fully discharged its duties in finding these facts within the severely constricted timetable that was ultimately caused by Appellants' decision to wait five months before filing a lawsuit and asking for expedited proceedings.

Missouri's courts have almost completed their first foray in almost forty years into judicial review of the General Assembly's "compactness" determinations. The separation of powers and political question concerns that this Court has already recognized are inherent in this case make it a milestone in recent Missouri constitutional and political history. The question of "how compact is compact enough?" is relevant not only for legislators, but for citizens and litigants who will rely upon this Court's decision to challenge future redistricting legislation and, given the Court's new reliance on individually-enforceable rights to "have a voice" in elections in their own districts, perhaps force greater judicial involvement in reviewing many other election-related laws. Indeed, under Appellants' proposed standard, redistricting litigation to enforce other individuals' compactness-related rights will likely continue until the 2020 Census reapportionment.

The Court has a complete factual map of the path Appellants wish it to take. The facts have shown that answering the question of "compact as may be" is not as simple as measuring or "eyeballing" a map to see whether it is the "most compact" or "as compact as possible," even after controlling for other constitutional mandates. The facts also show that such a standard will, in practice, leave almost no room for the General Assembly to make the "sensitive" political decisions that

this Court recently recognized must be protected under the standard of judicial review. This will spur serial "one-up" litigation as neither Missouri nor any other state has yet experienced.

It is possible for courts to meaningfully and objectively apply the concept of compactness to legislation while respecting Missouri citizens' choice to assign an inherently political process to our most political branch, the General Assembly, without endless and essentially *de novo* review by the seven appointed judges of this Court. This Court's first decision outlined such an approach, and contrary to Appellants' caricature, the circuit court faithfully applied it. By affirming the circuit court, as discussed below, this Court will uphold both the people's decision to assign redistricting exclusively to the legislature, and their instruction that districts shall be "as compact...as may be."

STATEMENT OF FACTS

A. The Redistricting Process

The McClatchey Appellants—including the only one to testify, Donna Turk—had a full and fair opportunity to present their views to the General Assembly in public hearings and written submissions. (Tr. I 116-117.) Ms. Turk attended four hearings, and missed the fourth because she was "late because of the drive." *Id.* Ms. Turk provided an alternative map—not the map she now proposes—at each hearing. (Tr.

I 118-119.) Ms. Turk testified to a specific conversation with Senator Rupp, Chairman of the Senate Redistricting Committee, in which he "challenged" her to draw a map that changed the Fifth and did not "ripple all across the State." (Tr. I 121.) Ms. Turk stated that she used online software to try to take up the challenge. (Tr. I 121-122.)

Appellants' assertion that the General Assembly tried to have an "expedited calendar" to make it "difficult, if not impossible" for citizens to participate is supported by no record citation. Ms. Turk's testimony established that citizens had a high degree of involvement in the process and had substantive interaction directly with legislators, even legislators who were not their own representatives. *Id.*

B. The McClatchey Litigation Map and H.B. 193

The McClatchey alternative was by design almost identical to H.B. 193 in the St. Louis area (including the features of which the Pearson Appellants complained); it primarily adjusted H.B. 193's Fifth and Sixth Districts, which in turn required adjustments in other parts of the state outside of the St. Louis area, making the Fourth and Sixth Districts less compact. *Compare* Ex. 2 (Grand Compromise) and Ex. 10 (McClatchey Alternative); *see also* Ex. 221 (Plaintiffs' Amended Responses to Intervenors' Second Interrogatories).

The McClatchey Appellants refused to admit a request for admission that H.B. 193 Districts 1-3 were "compact as may be" because "It was the intent of the McClatchey plaintiffs to propose a remedy to this Court which was identical to H.B. 193 with respect to Districts 1-3. However, plaintiffs were unable to provide a map precisely identical to H.B. 193 because plaintiffs were unwilling to subdivide precincts as was done in H.B. 193... However, upon reasonable inquiry plaintiffs are unable to determine if H.B. 193 is nonetheless as compact 'as may be' because plaintiffs have insufficient knowledge of or expertise with communities on the eastern side of the state. Compact as may be requires a factual inquiry into not only absolute spatial compactness but also circumstances and competing geographic, legal and constitutional considerations that might prevent a perfectly compact district, including but not limited to the Voting Rights Act." *See* Ex. 221.

None of the proposed alternative maps, including the McClatchey alternative, created more than one or two fewer county splits than H.B. 193. *Compare* Exs. 2, 10, 11, 12.

In the 1982, 1992 and 2002 congressional maps that went unchallenged, and in H.B. 193, a steadily growing portion of primarily suburban Jackson County was well-connected with an area of primarily

suburban Clay County, which, together with southern Platte County, formed a relatively similar and compact swath of suburban Kansas City (except for its southern suburbs). *Compare* McClatchey Appx. 27-32 (old maps) and Ex. 2 (H.B. 193). Similarly, over the same time period, a largely rural area of southeastern Jackson County had been joined with rural areas of adjoining Lafayette, Ray, and Saline Counties. *Id.* The latter three counties had been together in the Fourth District under the 2000 map. *Id.* And eastern or southeastern Jackson County had shared the Fourth District with some combination of Lafayette and Saline Counties (even including counties farther to the east and on the other side of the Missouri River in one instance) since 1952. *Id.*

The McClatchey alternative proposal disrupts these decades-old trends and relationships by adding to the Fifth District Jackson County territory as close as possible to downtown Kansas City. *Compare* McClatchey Appx. 27-32 (old maps), Ex. 2 (H.B. 193), and Ex. 10 (McClatchey Alternative). But in service of this goal, suburban areas of central and northeastern Jackson County which have now been in the Sixth District for decades (and before that, the Fourth District) have been newly placed into the Fifth District—a situation which has not existed since the first decade of the 1920s. *Id.* Parts of rural Cass

County that were never part of the Fifth have now been added to it. *Id.* Close-in parts of Kansas City in Clay County are severed into a district that is primarily suburban and rural. *Id.* And for the first time in history, the McClatchey proposal would divide both Cass and Ray Counties. *Id.* The McClatchey Fourth district would span from a divided Ray County to a divided Webster County south of I-44 in the Ozarks to a divided Audrain County in East Central Missouri. *Id.*

In short, the McClatchey proposal itself causes trade-offs when it reverses decades-old trends around the Kansas City area. *Compare* McClatchey Appx. 27-32 (old maps), Ex. 2 (H.B. 193), and Ex. 10 (McClatchey Alternative). A visual inspection, especially in comparison to prior maps, demonstrates all of these geographical and historical relationships. *Id.* Substantial evidence supported the circuit court's finding that there was no clear and undoubtable proof that the overall McClatchey map was substantially superior to H.B. 193. (*Id.; see also* Dr. Hofeller testimony at Tr. II 133-134 and 143.)

Neither Ms. Turk nor any other of Appellants' witnesses claimed any injury based on the compactness of Districts One, Two, Three, or Seven.

C. Dr. Thomas Hofeller

Intervenor-Defendants called Dr. Thomas Hofeller, PhD., as their expert witness. The parties stipulated to Dr. Hofeller's qualification as an expert in redistricting. (Tr. II 46.) Dr. Hofeller's resume showed that he has been involved as an expert or consultant in each round of decennial redistricting since 1970. (Tr. II 56; Ex. 201.)

Only a handful of experts have been working this field for the same amount of time as Dr. Hofeller in such a wide range of different states and different types of plans. (Tr. II 147.) All of the people with his level of experience work either primarily for Republicans or Democrats. *Id.* However, Dr. Hofeller has also done work for Democrats in major redistricting cases and in a major Illinois case, testified against his Republican clients by opining that their map violated the Voting Rights Act. (Tr. II 148-149.) In overruling a "leading" objection, the Court observed, "I doubt that this witness can be led anywhere he doesn't want to go." (Tr. II 68-69.)

Dr. Hofeller co-authored the article, "Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering," published in *The Journal of Politics*. (Ex. 201.) Dr. Hofeller has been a major player in the ongoing process of finding an objective method of measuring and applying courts' (and

dictionaries') "simple intuitive" explanation of the concept of compactness. (Ex. 59 at p. 1158, admitted at Tr. II 53.)

Dr. Hofeller testified that the article he co-authored offered a "further examination of some of the principles" of another article, "Measuring the Compactness of Legislative Districts," authored by H.P. Young. (Tr. II 52; Ex. 59, 223.) Dr. Hofeller testified that Dr. Young's article recites the Webster dictionary definition of compact, but "in many ways, it says that there really isn't an operational definition." (Tr. II 53-54.)

Dr. Hofeller testified that while the word "compact" may have a simple and intuitive dictionary definition, there is no general definition of "exactly how compactness manifests itself in redistricting." (Tr. II 125-126.) "The problem is it's a very complex principle." (Tr. II 126.)

In Dr. Hofeller's published works, and in his testimony, he asserted that many different attributes, at least including dispersion, perimeter shape, and population, are relevant for determining compactness. (Ex. 59 at p. 1158-1159; Tr. II 49-50.) Dr. Hofeller's testimony concluded that "in terms of redistricting, compactness is really a principle in search of a definition." (Tr. II 49.) Similarly, Dr. Hofeller and his colleagues concluded that compactness is not simply a matter of outline but instead has "multiple, distinct components." (Ex.

59 at p. 1176.) Dr. Hofeller testified that there may be attributes of compactness that are not measured by a statistical test. (Tr. II 50; Tr. II 87-88.) At the same time, Dr. Hofeller testified that one cannot simply apply the dictionary definition visually to a map, because despite the difficulty of mathematical analysis, "everybody found as they got into it, it was more complicated and multi-faceted than they ever imagined it was going to be." (Tr. II 152.)

Dr. Hofeller testified that there is no "bright line between a compact and noncompact district." (Tr. II 49.) Dr. Hofeller then explained that this is because there is disagreement about "what are the exact attributes of compactness." *Id.* "...[I]n terms of redistricting, compactness is really a principle in search of a definition. So there's no general agreement on what the attributes of compactness are." *Id.* Second, "there's no general agreement on the weight that proposed attributes would be given." *Id.* Third, there is "also no agreement on how to measure [those attributes]." *Id.* Fourth, there is no agreement "that there's any bright line where a plan moves automatically at some point on some given continuum from being compact to noncompact." (Tr. II 49-50.)

Dr. Hofeller also testified that it would not be possible to arrive at the "most compact" map, or the map that is as compact as possible,

even after controlling for equality of population and contiguity. (Tr. II 85-86.) Specifically, he explained that "You can actually take any of the general map concepts that were presented here and you could tinker with it and go into endless iterations of draws and redraws, and each time you drew you may be able to get it a little better on the scores." *Id.*

Dr. Hofeller testified further that in search for the "most compact" map, there would be diminishing returns and there would begin to be "trade-offs" among different "factors," or "attributes" of, compactness. (Tr II. 86.) Eventually, such efforts would lead, Dr. Hofeller testified, to "an endless loop of changing any map and, each time you do it, there are less choices on what you're drawing [for] whoever is drafting them." *Id.* He further testified that this would result in very little "room left for the General Assembly or legislature to make decisions." (Tr. II 86-87.) Instead, one could generate the appearance of options by manipulating maps "on the block level" to "create hundreds of maps." (Tr. II 86.) Significantly, this dynamic would occur even after controlling for equal population and contiguity. (Tr. II 86.)

Even in this case, Dr. Hofeller testified, improvements in all of the plans proposed in the waning days of litigation—even the McClatchey Appellants—are possible (Tr. II 85), and allowing

litigation-oriented plans to be the standard against which legislative enactments are measured will cause sandbagging and gamesmanship, essentially shifting redistricting from the legislature to serial lawsuits which can continue throughout the decade. (Tr. II 86-87, 168.)

Dr. Hofeller testified that despite the unworkability of compactness maximization, it is possible to determine whether a plan is compact or noncompact, and that "you have to remember that compactness is like a continuum running from hot to cold." (Tr. II 56.) He explained that at certain temperatures, everyone will agree that something is hot or cold, even if there is no agreement on when a "bright line" is passed from hot to cold. *Id.* Dr. Hoffeller testified that it is possible to make this determination by examining a general body of knowledge and precedent from Missouri and other states that apply a compactness criterion. (Tr. II 56-57; 119.)

Dr. Hofeller testified that the Grand Compromise is clearly closer to the "perfectly compact" pole than the "noncompact" pole. (Tr. II 57-58.) Whether based on an eyeball test or statistical test, Dr. Hofeller testified that none of the maps offered by the Appellants were substantially more compact than the Grand Compromise, that all of the proposals were within the same general degree of compactness, and that if there were a line dividing compact from noncompact maps, it

would not fall in between the Appellants' proposals and the Grand Compromise. (Tr. II 57-58.)

Dr. Hofeller's testimony included a comparison of Missouri maps to court-drawn or court-approved maps in several other states that also place importance on compactness, and in each case, he found that H.B. 193 was as compact or more compact than the other plans. (Tr. II 70-81; 120; Exs. 204-207; 209-214; 222.) Dr. Hofeller's state-to-state analysis was primarily visual (Tr. II 121) and took into account the fact that some states' shapes are less compact than Missouri. (Tr. II 72.) Dr. Hofeller explained that his comparison did include statistical analysis, and the "scores may be somewhat instructive, but certainly not definitive." (Tr. II 120.) For an example of where statistical tests can be "somewhat instructive," Dr. Hofeller showed how one can use the most relevant statistical tests to confirm that one map—Missouri's Grand Compromise, or H.B. 193—is "as good or better" than another map, a compact California congressional map drawn by a redistricting commission. (Tr. II 149-150; 156-160.)

In responding to the court's question about other states in his analysis that use the phrase, "as may be," Dr. Hofeller stated that Colorado "comes really close." (Tr. II 167.) Dr. Hofeller testified that Colorado requires that "Each district shall be as compact in area as

possible..." *Id.* Dr. Hofeller testified that even when considering Colorado's constitutional provisions, the fact that Colorado's seven-district maps were court-drawn, and the fact that one would expect to see more compact districts in a state like Colorado, Missouri's H.B. 193 was still more compact than either of the two Colorado maps. (Tr. II 73-76; Exs. 206, 207.)

Based on all of this, Dr. Hofeller testified that H.B. 193 is "compact," and stated that based on his experience, it does "not come near crossing" the transition from compact plans to non-compact plans. (Tr. II 119.) Dr. Hofeller further testified that based on his experience with designing and using methods of measuring compactness over several decades, even the map proposed by the Pearson Appellants immediately before trial was not significantly more compact than H.B. 193. (Tr. II 85; Ex. 215.)

Dr. Hofeller also testified that the McClatchey Appellants' proposed map generally did not score as well as the last Pearson alternative, which itself was not significantly more compact than H.B. 193. (Tr. II 133-134.) During repeated rounds of cross examination, Dr. Hofeller repeatedly testified that all the maps were within the same zone of compactness. (*See, e.g.,* Tr. II 143.) Finally, Dr. Hofeller demonstrated that the first alternative Pearson plan contained similar

features to the ones attacked by Appellants in H.B. 193, including a narrow neck extending from a largely rural and suburban third district extending into urban St. Louis. (Tr. II 145-146.)

Nowhere did Dr. Hofeller testify that any of the proposed alternative maps were significantly more compact than H.B. 193. Indeed, Dr. Hofeller testified that to be compact, a map must clearly be something akin to "cold" on a temperature scale, and not in the arguably temperate middle. (Tr. II 56.) On cross-examination, Dr. Hofeller testified that H.B. 193 "does not come near crossing" this middle zone, even if it is not a bright line. (Tr. II 119.)

Further, Dr. Hofeller testified that based on his experience, if H.B. 193 were invalidated for noncompactness, it would be the most compact map ever invalidated by any court in the United States. (Tr. II 81-82.) Dr. Hofeller testified that he "tracks all of the cases that come through," had even been tracking the instant case before he was contacted to be an expert, and that if he had seen a plan that he "felt was as compact as this plan was... overturned due to lack of compactness, [he] would have remembered it." (Tr. II 152-153.) Were H.B. 193 invalidated, Dr. Hofeller testified, it would lead to a "tremendous number of congressional" and other maps "that would be

redrawn across the country, probably throughout the whole decade." (Tr. II 82.)

D. David Roland

Appellants called David Roland, a lawyer with no experience in redistricting or compactness (Tr. I 139-141), as an expert on the history of the Missouri Constitution.

Mr. Roland testified only as to what he believed the constitutional drafting committee believed, not the intent of Missouri voters in approving the 1945 constitution. (Tr. I 175-176.) Further, Mr. Roland had to admit that whatever the voters in 1945 believed about crossing county lines, equal population, and compactness, the federal equal population requirement became paramount after *Reynolds v. Sims*, 377 U.S. 533 (1964). (Tr. I 157-158; 164.) Mr. Roland also could not dispute that the delegates to the convention ultimately decided not to include a whole-county requirement in the congressional districting provision. (Tr. I 193.)

Indeed, while still on direct examination, Mr. Roland testified that even the McClatchey proposal's inclusion of only part of Cass County would have offended constitutional delegates in 1945. (Tr. I 164-165.) But he continued, "It's difficult to know how expectations [of the delegates to the 1945 constitutional convention about districts they

would observe today] must be adjusted in light of the way the Supreme Court rulings end. You know, yeah, that's kind of the best answer. I hope that that's adequate." (Tr. I 165.) On cross-examination, Mr. Roland stated that he could not testify to the propriety of the McClatchey proposal's split of Cass and Ray Counties, because he would need to know population densities "and that's not my area of expertise." (Tr. I 190.)

Mr. Roland testified that "geographical area doesn't necessarily tell you anything. Because if you have a rural area, it can be spread." *Id.* But he then admitted that no concrete principles could be derived from the convention delegates' minutes regarding the need to substitute some higher-density suburban areas for lower-density rural areas in order to control the sprawl of an already-large district. (Tr. I 166.)

Additionally, Mr. Roland had to admit that before the 1945 convention, congressional maps approved when there were equal population and compactness requirements included wide variances in population and "T"-shaped districts. (Tr. I 181-183.) Indeed, surprisingly large population differences under the "as nearly equal in population as may be" standard persisted when the "as may be" standard was fresh in legislators' memory, in 1952. (Tr. I 184.)

Ultimately, Mr. Roland was not asked to take issue with Dr. Hofeller's opinions, and if anything, was forced to admit based on past examples that Missouri courts and legislators have never approached a standard of perfection when dealing with compactness or equal population.

E. The Circuit Court's Judgment

The circuit court's judgment, at pages 5-6, contained the following findings of fact which are not disputed by the McClatchey Appellants on appeal:

"[T]he evidence and facts put forth at trial does not convince the Court that 'as can be' is an appropriate definition. Defendants' evidence and facts presented at trial boil down to the proposition that there is no one 'bright line test' for compactness and that even after requirements like numerical equality and contiguity are satisfied, compactness exists along a continuum, it is not a specific idealized result. Even if the only maps considered are those that already meet the contiguity, equal population, and other constitutional requirements, Defendants' factual evidence showed that it is not possible in theory or practice to find the most compact map. The evidence and facts showed that the futile search for the most compact map will, however, tend to severely limit the options left for the General Assembly in choosing its map. As a matter of fact, this would leave it little space to exercise its

legislative discretion and make decisions 'regarding a number of sensitive considerations.' C. Ct. Op. 6."

ARGUMENT

I. THE CIRCUIT COURT APPLIED THE CORRECT STANDARD IN FINDING THAT H.B. 193 IS "AS COMPACT AS MAY BE" (POINTS I through IV)

A. Standard of Review

Appellants are correct that they bore the burden of overcoming the presumption of validity that attaches to H.B. 193 by proving that it "clearly and undoubtedly" does not meet the required level of compactness. Br. 8. Additionally, "[i]n [a] bench tried case, [this Court] must sustain the judgment unless there is no substantial evidence to support it, or it is against the weight of the evidence or it erroneously declares or misapplies the law." *Brownstein v. Rhomberg-Haglin & Associates, Inc.*, 824 S.W.2d 13, 15 (Mo. banc 1992). This means that only the circuit court's legal analysis, not its factual findings, is subject to *de novo* review. *Id.*

It is rare for Missouri appellate courts to reverse trial courts' factual determinations. "Appellate courts should exercise the power to set aside a decree or judgment on the ground that it is 'against the weight of the evidence' with caution and with a firm belief that the

decree or judgment is wrong." *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Contrary to Appellants' implied assertion that the testimony must be construed most favorably to them, "[t]he credibility of witnesses and the weight to be given their testimony is a matter for the trial court, which is free to believe all, part, or none of the testimony of any witness." *R.J.S. Sec., Inc. v. Command Sec. Services, Inc.*, 101 S.W.3d 1, 9-10 (Mo. App. W.D. 2003) (internal citation omitted).

Rather than considering only Appellants' characterization of their favorite snippets of testimony, appellate courts "accept as true evidence and inferences favorable to the trial court's judgment, *disregarding all contrary evidence*." *Id.* (emphasis added). *See also Harris v. Desisto*, 932 S.W.2d 435, 443 (Mo. App. W.D. 1996) ("we accept as true all evidence and permissible inferences favorable to respondents, the prevailing parties, and disregard any contradictory evidence").

Additionally, Appellants fail to remind the Court of Mo. R. Civ. P. 73.01(c), which requires that "[a]ll fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached." *See also R.J.S. Sec., Inc.*, 101 S.W.3d at 22. Further, "judgment will be affirmed under any

reasonable theory supported by the evidence." *Id.* "A correct result will not be disturbed on appeal merely because the trial court gave a wrong or insufficient reason for its judgment." *Harris,* 932 S.W.2d at 443. And in applying all of these principles, of course, "[t]he trial court's judgment is presumed valid and the burden is on the appellant to demonstrate its incorrectness." *Schaefer v. Rivers*, 965 S.W.2d 954, 956 (Mo. App. S.D. 1998).

B. Appellants' Reasonableness Standard Reaches the Same Result as the Circuit Court, and the Evidence Supports H.B. 193 Under Any Standard

Because the circuit court's judgment must be affirmed "on any reasonable theory supported by the evidence," and Appellants' reasonableness theory is even more forgiving than the minimum standard the circuit court would have needed, based on the evidence, to employ to reach the result it did, the circuit court's judgment against the Appellants must be affirmed. This simple point disposes of all of Appellants' "Counts" (or Points) I through IV, which merely explore different (and sometimes contradictory) implications of the "reasonableness" theory.

(1) Appellants' Reasonableness Standard, Properly Understood, Is Probably Not Unreasonable, But Is Forgiving

The McClatchey Appellants join the Pearson Appellants (and, of course, the Respondents) in finally recognizing that "as compact as may be" simply cannot mean that, once other mandates like equal population, contiguity, and federal requirements are met, compactness reigns supreme and only the most compact map is constitutional. The evidence was overwhelming that such a requirement is impossible to apply, both in theory and in practice. (*See, e.g.*, Tr. II 49-50, 85-87; C. Ct. Op. 5-6.)

Further, the evidence was overwhelming that such a requirement would squeeze out all other redistricting criteria (*see, e.g.*, Tr. II 85-87, C. Ct. Op. 5-6), violating the first "fundamental" principle this Court announced in its prior opinion, that redistricting is and must remain "predominately a political question." S. Ct. Op. 6.

Instead, the McClatchey Appellants wholeheartedly embrace a standard that the Pearson Appellants' latest brief approaches (but then drops to serve their other goals): "reasonableness under the circumstances." Br. 8. The Pearson Appellants (who for their own reasons earnestly desire a certain kind of redraw in the St. Louis area,

see Ex. 11) would allow a departure from the "most compact" map that meets other constitutional mandates just to the point at which the court decides there is no "gerrymandering" –a concept which has itself been found incapable of judicial resolution. Pearson Br. 28-30. The McClatchey Appellants would not, as the Pearson Appellants, borrow from concepts that are even murkier than compactness to measure gradations in compactness; instead, they would only require districts to be "reasonably compact under the circumstances." Br. 8.

(a) "Under the Circumstances"

Although Respondents do not disagree with the principle of "reasonableness," there are problems with the "reasonableness" standard the McClatchey Appellants now describe in their brief. First, they provide no complete accounting of the relevant "circumstances" a reasonable person should consider in deciding whether the districts are "reasonably compact." Prior Missouri case law they cite does, however, provide some guidance.

For example, the *Barrett* opinion, which stated that "compact" meant "closely united territory," had this to say:

> Heretofore I have quoted quite liberally from the opinion in the case of People v. Thompson, supra, treating, among other things, the failure of the Legislature of that state [Illinois] to obey the

> constitutional requirements that in the formation of senatorial districts the counties composing them should be contiguous, and **as compact as the nature of the work would reasonably permit.** That language is peculiarly applicable to the facts of this case.

Barrett v. Hitchcock, 241 Mo. 433, 146 S.W. 40, 65 (Mo. banc 1912) (emphasis added). As this Court recognized in its earlier decision in the instant case, the "nature of the work" of redistricting is supposed to be "predominately political," in which "sensitive" political considerations hold sway, not simply a mechanical process of maximizing compactness after controlling for other constitutional mandates. S. Ct. Op. 6. Under *Barrett*, then, the political "nature of the work" itself is an important circumstance to consider.

Fifty years after *Barrett*, the Supreme Court again affirmed that one relevant "circumstance" is the nature and difficulty of the legislative process (especially after districts are lost), as Missouri's voters deliberately assigned congressional redistricting to our most political branch, not to a compactness-maximization litigation expert:

> While **both compactness and population of the Tenth district could have been aided** by also adding these counties plaintiff mentions and others adjoining them it must be realized

> that **every member of the Legislature has his own views** (as do his constituents) as to the district in which his county (and others with which his county has previously been associated in a congressional district) should be placed **and it is not improper to consider the precedents of allocation of counties to existing districts in deciding the composition of new enlarged districts**. Very likely each legislator individually would draw somewhat different district lines. **Therefore, any redistricting agreed upon must always be a compromise**.

Preisler v. Hearnes, 362 S.W.2d 552, 557 (Mo. banc 1962).

Three things are notable about this Court's holding in *Hearnes*. First, it allowed deviations from compactness even where they were not necessary to keep county boundaries or equal population, and even where they arguably disserved the equal population principle. *Id.* Second, the Court recognized that every legislator (and his or her constituents) likely has different views about which counties should be grouped together, based on historical or other factors. *Id.* Third, the Court recognized that redistricting legislation must inherently be a compromise between legislators in a given house, and between the houses of the General Assembly. *Id.* That is by constitutional design, not by accident. In deciding what is "reasonable under the

circumstances" for a legislature, how can a court instead use what was "reasonable under the circumstances" in litigation, applying a measuring stick crafted by an attorney and expert months after the fact, solely for use in court, and solely to invalidate a legislative act?

(b) "Reasonably Compact"

The McClatchey Appellants are also unclear about what attributes comprise compactness (and therefore a "reasonably compact" plan), but on both the facts and law, "compactness" cannot be based solely on shape. For example, the "population density" of different parts of the state—a measure of where people actually live—must also be considered rather than mere geographic shapes. *Preisler v. Kirkpatrick*, 528 S.W.2d 422, 426 (Mo. banc 1975).

Additionally, as the McClatchey Appellants suggest, other cases provide some hint as to what has been found "reasonable," at least based on the primarily visual methods then available to courts and litigants. Even on a shape-only basis, the districts found noncompact in these prior cases were less compact than any district at issue here.

In *Hearnes*, the Tenth Congressional District devised after the 1960 Census ran along the Mississippi River from below Jefferson County to the Bootheel, and then included a narrow finger of four counties in single file extending to the west. This "T" shape was

allowed despite the fact that moving counties from the Eighth District, which formed a wedge into the Tenth, would have made the Tenth and Eighth more compact and helped remedy the 70,000-person population difference between the counties. *See Hearnes*, 362 S.W.2d at 557; McClatchey Appendix at 28.

Further, the 1962 Eighth District divided mid-Missouri and added awkward one-county appendages on each end: Saline in the west and Jefferson in the east. *Id.* The Ninth stretched from the so-called "lobster claw" of St. Charles County almost to Cole County and all the way to Mercer County in northwest Missouri. *Id.* This was despite the fact that it could have surrendered the northwesternmost counties to the neighboring Sixth and evened out the population difference between the districts, which reached into the tens of thousands. *Id.*

Finally, the overpopulated Fourth District approved in *Hearnes* encompassed all but the westernmost sliver of Jackson County, stretching several counties to the south and including Vernon County projecting like a "chimney" to the south. McClatchey Appendix at 28.

In *Preisler v. Secretary of State*, 341 F.Supp. 1158 (W.D. Mo. 1972), a three-judge federal court applied Missouri's constitutional compactness standard and drew a Tenth District that reached up from southeast Missouri to include the St. Louis area's Jefferson County as

an appendage. *Id.* McClatchey App. 29. Further, the court's Eighth District reached across the Missouri River only to take Boone County, and extended a small appendage into St. Louis County far to the east. *Id.* Notably, most of Jackson County was included in the Fourth District with the rural counties of Lafayette, Saline and Howard, extending far across the Missouri River to the east, and Vernon and Barton Counties, extending eventually in single file to the south. *Id.* The Sixth District projected a "chimney," Adair County, into the Ninth District. *Id.*

Similar examples can be found in the 1981 court-drawn map, which divided Jackson County three ways and included eastern Independence with Texas County, Missouri, deep in the Ozarks. McClatchey App. 30. Again, courts either drew or approved all of these maps under Missouri's compactness standard, which the McClatchey Appellants state requires "reasonable compactness under the circumstances."

Turning to state legislative districts, both *Preisler* cases, twenty years apart, approved districts that were less compact than the Fifth District in H.B. 193. The Fifth and Sixth Senatorial Districts in the City of St. Louis were drafted only a few years after the 1945 constitutional convention, contained multiple shoestring connections,

and were far less compact than the Fifth in H.B. 193; indeed, it is difficult to even follow the outlines of the Fifth Senatorial District. *See Preisler v. Doherty*, 284 S.W.2d 427 (Mo. banc 1955).

Twenty years later, the situation was no better: the Sixth Senate District zigged and zagged down the length of St. Louis City, obviously several miles long but probably at no point much more than one mile wide. *See Preisler v. Kirkpatrick*, 528 S.W.2d 422 (Mo. banc 1975). Not even mentioned by the Court majority, but also noticeably less compact than the Fifth District in H.B. 193, were the Fifth and First Senate Districts, the latter of which was shaped like a very skinny and long-toed "witch's" boot. *Id.*

The division of Greene County also resulted in less compact districts than H.B. 193's Fifth District. The Thirty-Third's finger into Greene did not merely include a peripheral area that was small in size compared to the rest of the Greene district; it was a sizeable cut into the heart of the seat of a single-county district, leaving a correspondingly narrow appendage in the northeastern part of the county. *Id.* Further, the Thirty-Third barely connected to Texas County in the east, and reached out with another one-county appendage to nick the Kansas line. *Id.* Clearly, Missouri courts considering compactness challenges have never slavishly followed

shape to the exclusion of all other attributes of compactness, but when they have considered shape, they have only invalidated districts when they are significantly less compact than H.B. 193's Fifth District.

Finally, it should be noted that several of the 2002 Congressional districts, which the McClatchey Appellants do not suggest fail the "reasonable compactness" standard, could be viewed as less compact than H.B. 193's districts. *See* McClatchey App. 32. The 2002 Sixth District includes not one, but two "appendages" across the Missouri River, into Jackson and Cooper Counties. The Fourth contains "appendages" similar to the districts under H.B. 193. And both the Second and Third Districts in St. Louis reach from large rural tracts into denser urban areas via necks far more narrow than the swath of Jackson County that connects the eastern and western portions of the new Fifth District under H.B. 193. Further, Jackson County is divided three ways, instead of two under H.B. 193. McClatchey App. 32.

In summary, "reasonable compactness" in Missouri has been a meaningful standard but relatively forgiving compared to the standard Appellants propose, and had led to maps no more compact and perhaps even less compact than the comparable modern-day state maps reviewed by Dr. Hofeller. *See* Exs. 204-207; 209-214; 222.

(c) Appellants' Standard Cannot Simply Mean that Deviations from Perfect Compactness Are Allowed Only for Other Constitutional Mandates or Political Subdivisions

In a few places, Appellants appear to argue that the "circumstances" that may be considered are merely other constitutional mandates. Br. 10. Elsewhere, Appellants argue that the standard may allow for greater deviation from perfect compactness, but only if there is no alternative that is "more compact" by a "substantial margin." Br. 12. Neither standard can be correct.

The first version of the "reasonableness" standard is really nothing more than a restatement of the "compactness maximization" standard that both the McClatchey and Pearson Appellants now seek to de-emphasize. Because software can easily draw contiguous and equal population maps, it is easy to comply with other constitutional requirements, leaving the field open for compactness and a host of other considerations. *Karcher v. Daggett*, 462 U.S. 725, 733 (1983) (advances in computer technology make it "relatively simple to draw contiguous districts of equal population").

But allowing only the most compact of all the maps in this easily-created universe is not a "reasonableness" standard at all; as Dr.

Hofeller testified without opposition, it requires that compactness maximization essentially occupy the field of legislative discretion. (Tr. II 86-87.) Not only is this an illusory goal and unworkable standard, it means that redistricting will no longer be a "predominately political question." S. Ct. Op. 6.

Appellants' second version of their "reasonableness" test allows for greater departure from perfection, but the test cannot be based solely on one district. That is because "substantial" improvements in one district—under the McClatchey's litigation-oriented proposal, the Fifth—comes at a cost to other districts, at least those that are nearby. Here, those districts are the Sixth and Fourth, which, as they lose denser suburban areas, both have to grow in size and become more unwieldy. *Compare* Ex. 2 with Ex. 10. Further, this standard requires courts to make fine compactness comparisons between litigation-oriented maps and actual proposals considered and passed by the legislature. As discussed above, a "reasonable person" and "reasonable compactness" standard should not compare litigation apples to legislative oranges.

(d) Burden-Shifting Only Applies in Equal Population Cases Under the U.S. Constitution

Although Appellants suggest in a portion of their brief that "burden-shifting" applies, this Court has never suggested or held that such an approach applies to compactness challenges. Br. 13-15. Indeed, if, as Appellants suggest, the only "defenses" the state could raise after the "burden-shift" were that no other conceivable map would allow contiguity, equal population, or cut fewer subdivisions, the burden-shifting approach would be a meaningless exercise. It would cloak in the guise of a procedural rule the same unworkable "compactness-maximization" standard the McClatchey Appellants elsewhere claim to disavow.[1]

Indeed, courts applying a constitutional "compact as possible" standard have specifically considered whether to adapt the equal protection/equal population burden-shifting approach in the

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[1] This was the approach of the Iowa court cited by Appellants. *See Noun v. Turner*, 193 N.W.2d 784, 791 (Ia. 1972) (finding against the state solely because "nothing appears to indicate the strange shapes are necessitated by considerations of population equality or result from unfeasibility.").

compactness context, and, recognizing that it is logically tantamount to a complete reallocation of the burden of proof and a change in substantive law, have declined to do so. *See, e.g., Parella v. Montalbano*, 899 A.2d 1226, 1233, 1251 (R.I. 2006) (because "redistricting is a legislative function, we decline to reallocate the burden of proof to the General Assembly" in applying a "compact as possible" standard).

Further, the underlying reason that federal courts shift the burden of proof in *equal population* cases is absent in compactness challenges. In making a federal equal protection claim, there is an "as nearly as practicable" standard which "requires that the State make a good-faith effort to achieve precise mathematical equality." *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (citing *Kirkpatrick v. Preisler*, 394 U.S. 526, 532 (1969)). But on the issue of compactness, this Court has consistently (and again recently) held that compactness cannot be achieved with absolute or mathematical precision. S. Ct. Op. 6-7. Indeed, the undisputed facts at trial established that this was true. (Tr. II 49-52, Ex. 59.)

In contrast, the federal standard is "precise mathematical equality." *Karcher*, 462 U.S. at 730. For that reason, the federal burden-shifting test requires that "unless population variances among

congressional districts are shown to have resulted despite such effort [to achieve mathematical equality], the State must justify each variance, *no matter how small*." *Id.* (emphasis added). This paradigm of precise measurements and precisely measurable variances that can be pinpointed and justified is foreign to the concept of compactness.

Further, the equal protection showing that plaintiffs must make under *Karcher* includes a subjective showing that the variances "were not the result of a good-faith effort to achieve equality." *Id.* at 731. But this Court has rejected precisely such a subjective "good faith" standard in the compactness context. S. Ct. Op. 7. Judge Finch was simply incorrect in his 1975 *Kirkpatrick* dissent that "there is no reason" why the rules should be different in equal population and compactness cases. Accordingly, there is not and never has been a burden-shifting approach where compactness is at issue; statutes are presumed constitutional and must prove that a districting plan is not "as compact...as may be."

(e) In Summary, a Reasonableness Standard Should Consider Compactness As Generally Applied in Legislative Redistricting

For all of the reasons discussed above, a "reasonably compact under the circumstances" standard, properly understood, finds

substantial support in Missouri precedent. However, the Supreme Court has never held that the only "circumstances" that can be considered are other constitutional mandates. Instead (or perhaps in addition), those circumstances include the "nature of the work"—compromise and negotiation by individual legislators who are tasked with preparing a statewide plan. That is what makes redistricting a "predominately political question." S. Ct. Op. 6.

As Dr. Hofeller testified, improvements in all of the plans proposed in the waning days of litigation—even the McClatchey Appellants—are possible (Tr. II 85), and allowing litigation-oriented plans to be the standard against which legislative enactments are measured will cause sandbagging and gamesmanship, essentially shifting redistricting from the legislature to serial lawsuits which can continue throughout the decade. (Tr. II 86-87, 168.) In conclusion, a reasonableness standard may be workable, but it must consider all of the circumstances, including the fact that a legislature, not a litigation team and expert, must draft redistricting legislation.

(2) The Weight of the Evidence Supports H.B. 193 Under Any Standard

Dr. Hofeller testified that H.B. 193 is "compact," and stated that based on his experience, it does "not come near crossing" the transition

from compact plans to non-compact plans. (Tr. II 119.) Dr. Hofeller further testified that based on his experience in designing and using methods of measuring compactness over several decades, even the map proposed by the Pearson Appellants immediately before trial in an effort to invalidate the Grand Compromise, H.B. 193, was not significantly more compact than H.B. 193. (Tr. II 85; Ex. 215.) Dr. Hofeller also testified that the McClatchey Appellants' proposed map generally did not score as well as the last Pearson alternative, which itself was not significantly more compact than H.B. 193. (Tr. II 133-134.) During repeated rounds of cross-examination, Dr. Hofeller continued to testify with certainty that all the maps were within the same zone of compactness. (Tr. II 143.)

Nowhere did Dr. Hofeller testify that any of the proposed alternative maps—even those prepared immediately before trial in a last-ditch effort to invalidate H.B. 193—were significantly more compact than H.B. 193. Indeed, Dr. Hofeller testified that to be compact, a map must clearly be something akin to "cold" on a temperature scale, and not in the arguably temperate middle. (Tr. II 56.) On cross-examination, Dr. Hofeller testified that H.B. 193 "does not come near crossing" this middle zone, even if it is not a bright line. (Tr. II 119.)

Further, Dr. Hofeller testified that based on his experience, if H.B. 193 were invalidated for noncompactness, it would be the most compact map ever invalidated by any court in America. (Tr. II 81-82.) Dr. Hofeller testified that he "tracks all of the cases that come through," had even been tracking the instant case before he was contacted to be an expert, and that if he had seen a plan that he "felt was as compact as this plan was... overturned due to lack of compactness, [he] would have remembered it." (Tr. II 152-153.) Were H.B. 193 invalidated, Dr. Hofeller testified, it would lead to a "tremendous number of congressional" and other maps "that would be redrawn across the country, probably throughout the whole decade." (Tr. II 82.) Certainly, the circuit court could have noted all of the prior congressional and state legislative districts (as discussed above) which would had to have been invalidated throughout Missouri history were H.B. 193 to be found insufficiently compact.

Although the standard of review requires this Court to "accept as true evidence and inferences favorable to the trial court's judgment, *disregarding all contrary evidence*," the testimony of David Roland, a lawyer with no experience in redistricting or compactness but who was retained by the McClatchey Appellants as an expert on the history of the Missouri Constitution, is not to the contrary.

Mr. Roland testified only as to what he believed the constitutional drafting committee believed, not the intent of Missouri voters in approving the 1945 constitution. (Tr. I 175-176.) Further, Mr. Roland had to admit that whatever the voters in 1945 believed about crossing county lines, equal population, and compactness, the federal equal population requirement became paramount after *Reynolds v. Sims*, 377 U.S. 533 (1964). (Tr. I 157-158; 164.) Mr. Roland also could not dispute that the delegates to the convention ultimately decided not to include a whole-county requirement in the congressional districting provision. (Tr. I 193.)

Indeed, while still on direct examination, Mr. Roland testified that even the McClatchey proposal's inclusion of only part of Cass County would have offended constitutional delegates in 1945. (Tr. I 164-165.) But he continued, "It's difficult to know how expectations [of the delegates to the 1945 constitutional convention about districts they would observe today] must be adjusted in light of the way the Supreme Court rulings end. You know, yeah, that's kind of the best answer. I hope that that's adequate." (Tr. I 165.)

On cross-examination, Mr. Roland stated that he could not testify to the propriety of the McClatchey proposal's split of Cass and Ray

Counties, because he would need to know population densities "and that's not my area of expertise." (Tr. I 190.)

Mr. Roland testified that "geographical area doesn't necessarily tell you anything. Because if you have a rural area, it can be spread." *Id.* But he then admitted that no concrete principles could be derived from the convention delegates' minutes regarding the need to substitute some higher-density suburban areas for lower-density rural areas in order to control the sprawl of an already-large district. (Tr. I 166.)

Additionally, Mr. Roland had to admit that before the 1945 convention, congressional maps approved when there were equal population and compactness requirements included wide variances in population and "T"-shaped districts. (Tr. I 181-183.) Indeed, surprisingly large population differences under the "as nearly equal in population as may be" standard persisted when the "as may be" standard was fresh in legislators' memory, in 1952. (Tr. I 184.) Ultimately, Mr. Roland was not asked to take issue with Dr. Hofeller's opinions, and if anything, was forced to admit based on past examples that Missouri courts and legislators have never approached a standard of perfection when dealing with compactness or equal population.

Moving beyond expert testimony, the circuit court would certainly have observed that the McClatchey alternative was by design almost identical to H.B. 193 in the St. Louis area (including the features of which the Pearson Appellants complained); it primarily adjusted H.B. 193's Fifth and Sixth Districts, which in turn required adjustments in other parts of the state outside of the St. Louis area, making the Fourth and Sixth Districts less compact. *Compare* Ex. 2 (Grand Compromise) and Ex. 10 (McClatchey Alternative); *see also* Ex. 221 (Plaintiffs' Amended Responses to Intervenors' Second Interrogatories).

Additionally, the circuit court would have observed that none of the proposed alternative maps, including the McClatchey alternative, created more than one or two fewer county splits than H.B. 193. *Compare* Exs. 2, 10, 11, 12.

Finally, the circuit court's review of the maps would have showed that in the 1982, 1992 and 2002 congressional maps that went unchallenged, and in H.B. 193, a steadily growing portion of primarily suburban Jackson County was well-connected with an area of primarily suburban Clay County, which, together with southern Platte County, formed a relatively compact area of suburban Kansas City (except for

its southern suburbs). *Compare* McClatchey Appx. 27-32 (old maps) and Ex. 2 (H.B. 193).

Similarly, over the same time period, a largely rural area of southeastern Jackson County had been joined with rural areas of adjoining Lafayette, Ray, and Saline Counties. *Id.* The latter three counties had been together in the Fourth District under the 2002 map. *Id.* And eastern or southeastern Jackson County had shared the Fourth District with some combination of Lafayette and Saline Counties (even including counties farther to the east and on the other side of the Missouri River in one instance) since 1952. *Id.*

The circuit court would have noted that the McClatchey alternative proposal disrupts all of these decades-old trends and relationships under the assumptions that downtown Kansas City is the heart of the Fifth District, and that Jackson County and neighboring territory as close in as possible to the downtown must be added to it at all costs. *Compare* McClatchey Appx. 27-32 (old maps), Ex. 2 (H.B. 193), and Ex. 10 (McClatchey Alternative). But in service of this goal, the McClatchey plan would place suburban areas of central and northeastern Jackson County which have now been in the Sixth District for decades (and before that, the Fourth District) into the Fifth District—a situation which has not existed since the first decade of the

1920s. *Id.* Parts of rural Cass County that were never part of the Fifth would now be added to it. Close-in parts of Kansas City in Clay County would be severed into a district that is primarily suburban and rural. And for the first time in history, the McClatchey proposal would divide both Cass and Ray Counties. *Id.* The McClatchey Fourth district would span from a divided Ray County to a divided Webster County south of I-44 in the Ozarks to a divided Audrain County in East Central Missouri. *Id.*

In short, the McClatchey proposal itself causes trade-offs when it reverses decades-old trends around the Kansas City area. *Compare* McClatchey Appx. 27-32 (old maps), Ex. 2 (H.B. 193), and Ex. 10 (McClatchey Alternative). A visual inspection, especially in comparison to prior maps, readily demonstrates all of these geographical and historical relationships. *Id.* Substantial evidence supported the circuit court's finding that there was no clear and undoubtable proof that the overall McClatchey map was substantially superior to H.B. 193.

Finally, substantial evidence showed that each of the three ideas this Court enumerated as "fundamental" to the "as may be" standard of review—whether or not it is really a "reasonableness under the circumstances" inquiry—were satisfied by H.B. 193 in this case.

With respect to the first criterion, Dr. Hofeller's testimony indicated that H.B. 193 was much closer to the "perfectly compact" pole than the "noncompact" pole. Appellants offered testimony that other plans crafted in the closing moments of litigation might have been marginally more compact than H.B. 193, but never disputed Dr. Hofeller's testimony about the relatively "cold" place of H.B. 193 on the overall temperature scale of compactness (assuming a perfectly compact plan is "cold"). Appellants never contradicted Dr. Hofeller's further testimony that if H.B. 193 were deemed not compact enough, this decision would be a clear outlier. Nor did Appellants contradict Dr. Hofeller's testimony that if the compactness standard were raised to require something close to the most compact plan, there would be little if any room left for the General Assembly to exercise its discretion, stripping the redistricting process of its "predominately political" character. Accordingly, the first of the Court's three fundamental ideas was satisfied.

Second, it was undisputed that H.B. 193 satisfies all other constitutional criteria.

Third, neither the Pearson expert, Dr. Kimball, nor the McClatchey expert, Mr. Roland, disagreed with Dr. Hofeller that compactness cannot be measured with precision and that even the

attributes which make up compactness—let alone their relative weights in the analysis—are subject to disagreement. Based on Dr. Hofeller's testimony regarding his visual and statistical review, the circuit court could (and should) have concluded that the differences in compactness between even the Appellants' last-minute, litigation-crafted plans and H.B. 193, the product of legislative compromise, were not so substantial that some plans could be judged to meet the standard, while H.B. 193 could be judged to fail.

Under any standard, the circuit court must be deemed to have found the evidentiary facts necessary to find the ultimate fact that H.B. 193 is "as compact as may be." See Mo. R. Civ. P. 73.01(c).

(3) Summary

At best, Appellants can claim to have crafted litigation-specific plans which make various trade-offs with the Grand Compromise and achieve political results which are presumably more acceptable to them. But as Dr. Hofeller testified, those alternatives do not lead to plans that are not substantially more compact than H.B. 193, and all of the plans can be deemed acceptably compact. H.B. 193 is already much closer to the "perfect compactness" pole than to the noncompact pole, and were it invalidated, would be an outlier among all the plans judged to be "noncompact" by any court; it is as compact or more compact than

plans approved or drawn by courts in other states that also treat compactness as important.

Turning only to Missouri, H.B. 193's Fifth District, perhaps the least compact of its districts, is more compact than districts judged not "compact as may be" by prior Missouri courts, but allowed to stand based on the compactness of the overall map. Indeed, it is more compact than other seemingly questionable districts that survived Missouri courts' compactness reviews.

Finally, H.B. 193 meets all of the elements of the "as compact as may be" standard of review as outlined by this Court in its prior opinion in this case. Regardless of whether the more forgiving "reasonably compact under the circumstances" test is used, H.B. 193 passes constitutional muster.

CONCLUSION

For the foregoing reasons, the Appellants have failed to carry their burden of proving clearly and undoubtedly that the General Assembly's Grand Compromise, H.B. 193, is not "as compact as may be." This Court should affirm the circuit court's decision and order that final judgment be entered against the Appellants on their last remaining claims.

Respectfully Submitted,

GRAVES BARTLE MARCUS & GARRETT LLC

Todd P. Graves (Mo. 41319)
Edward D. Greim (Mo. 54034)
Clayton J. Callen (Mo. 59885)
1100 Main Street, Suite 2700
Kansas City, Missouri 64105
Tel: (816) 256-4144
edgreim@gbmglaw.com

Attorneys for Intervenor-Respondents

CERTIFICATE OF COMPLIANCE

I hereby certify that I prepared this brief using Microsoft Word 2010 in Century Schoolbook size 13 font. I further certify that this brief complies with the word limitations of Rule 84.06(b), and that it contains 10,796 words.

Attorney

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2012, I filed a true and correct copy of the foregoing Brief and its Appendix via the Court's electronic filing system, which notified the following:

James R. Layton
SOLICITOR GENERAL
207 W. High Street
PO Box 899
Jefferson City, MO 65102-0899
James.Layton@ago.mo.gov
Counsel for Secretary of State Carnahan and Attorney General Koster

Jamie Barker Landes
211 SE Grand Avenue
Suite A
Lee's Summit, MO 64063
jlandes@gmail.com
Counsel for Appellants

Gerald P. Greiman
Frank Susman
Thomas W. Hayde
1 N. Brentwood Blvd.
Suite 1000
St. Louis, MO 63105
ggreiman@spencerfane.com
fsusman@spencerfane.com
thayde@spencerfane.com

Keith A. Wenzel
308 E. High Street, Ste. 222
Jefferson City, MO 65101
(573) 634-8115 (telephone)
(573) 634-8140 (facsimile)
kwenzel@spencerfane.com

Counsel for Pearson Appellants

Edward D. Greim